ORIGINAL

Law Offices of Alan C. Gold, P.A.

050297-TP

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April 28, 2005

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05 APR 29 A 11:34
COMMISSION CLERK

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

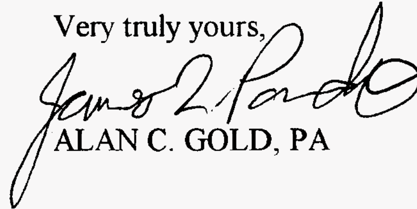
Dear Ms. Bayo:

Enclosed with this letter on behalf of STS Telecommunication Services, Inc. ("STS") are the original and fifteen copies of the "Emergency Petition of Saturn Telecommunication Services, Inc. Against BellSouth Telecommunications, Inc. to Require BellSouth to Allow Additional Lines and Locations to STS's Embedded Base, and For Expedited Relief."

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me in the envelope provided.

Thank you for your assistance with this filing.

Very truly yours,



ALAN C. GOLD, PA

Enclosure:

cc: Ms. Meredith Mays, BellSouth
STS Telecom

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RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
04167 APR 29 05
FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Dispute Regarding Embedded Base Between Saturn Telecommunication Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.

050297-TP

EMERGENCY PETITION OF SATURN TELECOMMUNICATION SERVICES, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. TO REQUIRE BELLSOUTH TO ALLOW ADDITIONAL LINES AND LOCATIONS TO STS'S EMBEDDED BASE, AND FOR EXPEDITED RELIEF

Petitioner, Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS") by and through the undersigned Counsel and pursuant to § 364.01(4)(g) Florida Statutes, and Rules 25-22.036(2), 28-106.201 and 28.106.202, Florida Administrative Code, hereby files this Complaint against Respondent, BellSouth Telecommunications, Inc. ("BellSouth"), (1) seeking an emergency order compelling BellSouth to allow STS to add additional lines and locations to STS's Embedded Base, and (2) requesting that a stay be issued prohibiting BellSouth from discontinuance of any service provided by STS pending resolution of this matter, and in support thereof states as follows:

PARTIES

1. STS is a competitive local exchange carrier ("CLEC") and inter-exchange carrier ("IXC") certified by the Florida Public Service Commission (the "Commission") to provide telecommunications services in Florida. STS is also a "telecommunications carrier" and local exchange carrier" under the Telecommunications Act of 1996 as amended (the "Act"). STS's full name and address is:

   STS Telecommunication Services, Inc.
   12233 SW 55 Street
   Suite 811
   Cooper City, FL 33330

DOCUMENT NUMBER-DATE
04167 APR 29 05
FPSC-COMMISSION CLERK

All documents filed, served or issued in this docket should be served on the following:

Alan C. Gold, P.A.
1320 South Dixie Highway
Suite 870
Coral Gables, FL 33146
(305) 667-0475, ext. 1 (office)
(305) 663-0799 (fax)

2. BellSouth is an incumbent local exchange carrier ("ILEC") certified by the Commission to provide local exchange services in Florida. BellSouth is an ILEC as defined in § 251(h) of the Act, and is a "local exchange telecommunications company" as defined by § 364.02(6), Florida Statutes. BellSouth's address for receiving communications from the Commission is:

Meredith Mays, Esq.
Senior Regulatory Counsel
BellSouth Telecommunications, Inc
150 South Monroe Street
Room 400
Tallahassee, FL 32301-1556
(404) 335-0750 (office)
(404) 614-4054 (fax)

JURISDICTION

3. The Commission has jurisdiction with respect to the claims asserted in this Petition under Chapter 120 and 364, Florida Statutes, and Chapters 25-22 and 28-106, Florida Administrative code

4. The Commission also has jurisdiction under the Federal Act under 47 U.S.C. § 251(d)(3)(conferring authority to State commissions to enforce any regulation order or policy that is consistent with the requirements of Section 251) with respect to matters raised in this Motion.

INTRODUCTION

5. STS files this Petition because BellSouth has taken actions that constitute a violation of the FCC's recently issued Triennial Review Remand Order ("TRRO") and also a breach of its interconnection agreement ("Agreement") with STS. Specifically, BellSouth stated that it will reject requests for additional lines and change of locations for UNE-P customers in STS's embedded base beginning April 17, 2005 pursuant to its interpretation of the TRRO. This course of action violates the TRRO and breaches STS's Agreement in at least two respects: (i) by expressly violating the clear mandate of the TRRO by rejecting UNE-P change orders for customers in STS's embedded base that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure establishment by the Agreement. Contrary to written allegations by BellSouth, the TRRO does not permit BellSouth to reject STS's UNE-P orders for changes of numbers and locations for STS's embedded customer base beginning April 17, 2005 and ignoring the change of law process with respect to such UNE-P orders.

6. In order to service the needs and retain existing customers, STS must continue placing UNE-P orders in Florida after April 17, 2005, for its embedded base to add lines and change locations for existing customers. Unless this Commission declares that BellSouth may not reject such UNE-P orders for existing customers, STS will continue to sustain immediate and irreparable injury, and BellSouth will continue its anticompetitive behavior designed solely to unfairly and unlawfully leave STS customers with no alternative except to switch their telecommunications services to BellSouth. Florida consumers currently benefiting from the local service STS offers

in Florida also are being injured by BellSouth's illegal actions. STS therefore requests that the Commission consider this matter on an emergency basis and grant the relief requested in this Motion.

7. BellSouth and IDS Telcom, LLC entered into an interconnect agreement dated February 5, 2003, which was approved by the Florida Public Service Commission. See Docket number 03-0158-TP.

8 The Agreement became effective on May 30, 2003

9 STS adopted in its entirety the Agreement, which adoption was approved by the Commission on September 5, 2003 in Docket number 03-0487-TP.

RELEVANT TERMS OF THE AGREEMENT

10. Attachment 1, Section 3.1 of the Agreement states the following:

> 3.1 .... Subject to effective and applicable FCC and Commission rules and orders, BellSouth shall make available to [STS] for resale those telecommunications services BellSouth makes available... to customers who are not telecommunications carriers....

11. Section 14.3 of the Agreement states the following:

> 14.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of IDS Telcom or BellSouth to perform any material terms of this Agreement, IDS Telcom or BellSouth may, on thirty (30) days' written notice, required that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.

12. When the parties are unable to agree on how to implement a change in law, they are directed to pursue dispute resolution. The Agreement's dispute resolution provision at Section 10 provides as follows:

> 10. **Resolution of Disputes**
>
> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

PREVIOUS RULINGS BELOW

13. In August 2003, the FCC released its Triennial Review Order ("TRO") that found impairment nationally with regard to mass markets local switching, but requested a granular review by state public service commissions of the conditions for competitive local exchange service in geographic markets in each state. These rulings were vacated and remanded by *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II") on March 2, 2004. The D.C. Circuit's mandate initially was scheduled to issue on May 1, 2004, but the court later granted an extension to June 15, 2004. During the time before the mandate was issued, great uncertainty arose as to whether BellSouth would continue to process UNE-P orders.

14. The FCC issued the TRRO on February 4, 2005. The FCC determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to § 251(c)(3) of the Federal Act. The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of

the effective date of the TRRO, and allows BellSouth time in order to develop the procedure and/or techniques to switch the CLECs UNE-P arrangements to alternative arrangements. (TRRO § 227.) The FCC determined that the price for § 251(c)(3) unbundled switching during the transition period would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004, plus one dollar, or (ii) the rate established by a state commission between June 16, 2004, and the effective date of the TRRO plus one dollar. (TRRO § 228.)

15. With respect to new UNE-P orders after the effective date of the TRRO, the FCC stated: "The transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." (TRRO § 227.)

16. The TRRO also adopts the following:

> "...a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternate arrangements within twelve months of the effective date of [the] order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers." (See TRRO, § 199)(citations omitted)(emphasis added)

Clearly, during the transition period, the ILEC must continue to provide UNE-P service to the CLEC "embedded customer base".

17. The TRRO does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the TRRO directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(TRRO § 233, footnotes omitted.)

BELLSOUTH'S REFUSAL TO ACCEPT AND PROCESS ORDERS

18. BellSouth issued a letter dated April 12, 2005, in which it notified STS that the TRRO had been released. Among other things, BellSouth "stated that it will continue to receive and will not reject CLEC orders for new adds as they relate to the former UNEs identified by the FCC until the earlier of (1) an order from an appropriate body, either an commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005." A true and correct copy of the April 12 letter is attached hereto as Exhibit "A". Additionally, BellSouth has rejected orders for the addition of lines to customers on STS's embedded base. (See Affidavit of Keith Kramer attached hereto as Exhibit "B")

19. BellSouth's actions of refusing to accept STS's UNE-P orders for additional lines and locations to STS's embedded base beginning April 17, 2005, is against the clear and unambiguous language of the TRRO. In other states, BellSouth has attempted to refuse other CLECs' orders for additional lines and locations to the embedded base, and the states have consistently rejected BellSouth's arguments and ruled that the TRRO does not allow BellSouth to refuse orders for additional lines and locations.

20. The North Carolina Utilities Commission in Docket No. P-55, SUB 1550 held the following:

> "...the Commission believes that the bright line that the FCC was drawing was between those *inside* the embedded customer base and those *outside* of it. After all, the TRRO focuses on the "embedded customer base," not on existing access lines. The commission does not believe that it was the FCC's intent to impede or otherwise disrupt the ability of [CLECs] to adequately serve their existing base of customers in the near term. The Commission notes that the [CLECs] now serve thousands of customers, many of them business customers, with these de-listed UNE arrangements. Given the vital importance of fast telecommunications access in a highly dynamic economy, these customers would be baffled and impatient if they were to discover that adding a new line or even simply a new feature in the near term was impossible with their current provider. They may very well lose confidence in that provider. This is not good for competition, which is the overarching purpose of the Telecommunications Act.
>
> Thus, we believe that, through a planned orderly, and nondisruptive transition process under state commission supervision, the FCC intended that the [CLECs] should retain the ability to adequately serve their customers during the transition period....

(See In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order, State of North Carolina

Utilities Commission, Raleigh, Order Concerning New Adds, Page 12, Docket No. P-55, SUB 1550, a copy of which is attached as Exhibit "C")

21. The Georgia Public Service Commission has also issued a similar order against BellSouth. (See In Re: Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements, Order on MCI's Motion For Emergency Relief Concerning UNE-P Orders, Before the Georgia Public Service Commission, Docket No. 19341-U, a copy of which is attached as Exhibit "D"). The Florida Public Service Commission has not yet ruled in any other docket on matters addressed in this Petition, and therefore the same issues are ones of first impression. This Commission should find the rulings by the North Carolina Utilities Commission and Georgia Public Service Commission persuasive.

22. Pursuant to the TRRO, during the transition period, BellSouth must continue to accept and provision STS's UNE-P orders for additional lines and location changes to its embedded base at the rates specified in the TRRO. By stating that it will not accept UNE-P orders for new adds beginning April 17, 2005, BellSouth has breached the TRRO.

23. The TRRO only prohibits CLECs from adding UNE-P services to new customers; not from servicing the needs of the CLECs existing UNE-P customers. If one accepts BellSouth's strained interpretations of the TRRO, the transition period is rendered meaningless. Section 227 of the TRRO states that the twelve month transition period "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order*." (Emphasis added.) The TRRO requires that

parties "implement the Commissions findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." (TRRO § 233.) The TRRO requires that BellSouth allow CLECs to place UNE-P orders for additional lines to the embedded base. This is merely servicing existing customers. Moreover, the change in law (TRRO) gives a twelve-month transition period to both the CLECs and ILECs to prepare for the change.

24. The twelve-month transition period required by the TRRO specifically applies to the embedded customer base. (TRRO § 199). The TRRO states that competitive LECs (e.g. STS) must submit orders within twelve months to convert their embedded UNE-P customer base to UNE-L or another arrangement. (TRRO § 216). However, within that twelve-month period, incumbent LECs (e.g. BellSouth) must continue providing access to mass market unbundled local circuit switching at a rate of TELRIC plus one dollar for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements. (See Id.)

25. Furthermore, the Interconnect Agreement does not permit parties to implement changes in law unilaterally. To the contrary, the Interconnect Agreement requires that a party wishing to implement a change in law take specified steps, including (i) ensuring that the governmental action in question has taken effect; (ii) providing notice of the change of law to the other party; (iii) undertaking negotiations for the specified period; and (iv) if necessary, pursuing dispute resolution. (Agreement, Section 14.3.) By ignoring the change of law provision in the parties' Agreement, BellSouth has breached the Agreement.

BELLSOUTH'S ACTIONS ARE ANTI-COMPETITIVE

26. The commission has the power, inter alia, to exercise its exclusive jurisdiction in order to protect the public by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices; to encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services; and to ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. See Fla. Stat. § 364.01(4).

27. BellSouth cannot arbitrarily refuse to STS's orders for customers to add lines to its embedded base because such actions are anticompetitive, against the public welfare and are otherwise in violation of state and federal antitrust laws. STS has been substantially harmed by the inability to provide the same services that BellSouth provides to its end users, i.e. the ability to add additional lines. See Affidavit of Keith Kramer, attached hereto as Exhibit "B". Unless this Commission acts immediately, due to BellSouth's unlawful actions, STS's UNE-P customers will have no other alternative except to switch services to BellSouth should the customers want to add additional lines or make simple changes in service, such as a change in location.

28. BellSouth's refusal to allow additional lines or change locations to STS's embedded base has caused STS to sustain tremendous damages. STS's customers who wish to add additional lines or change locations are unable to do so. These customers have no other choice but to discontinue service with STS and choose BellSouth as their carrier

29. The motive behind BellSouth's scheme is to drive out its competition, including STS from the market, by engaging in a massive win-back campaign. In addition to not allowing additional lines and locations to the embedded base of STS, BellSouth has been attempting to steal STS's customers. In one instance, BellSouth told an STS customer whose services had been interrupted due to an accident, that if the customer switched service to BellSouth, BellSouth would restore the customer's services immediately. BellSouth's tactics of prohibiting STS to properly service its customers by not allowing new lines and locations to the embedded base, combined with BellSouth's attempts to steal STS customers, constitute anticompetitive behavior in violation of state and federal law.

30. CLECs such as STS must be able to continue to supply lines to its embedded customer base, whether the customer requires a new line because of damage, because of business growth, or if the customer desires to move its business or residence to a new location. For BellSouth to take the position that they are not required to add additional lines and locations for the embedded base during the transition period, based on the TRRO is ludicrous because the TRRO does require the same. Moreover, BellSouth has not demonstrated that it has met its obligations under the TRRO; namely, its capability to timely switch UNE-P customers to alternative arrangements. The TRRO did not state the ILECs are required to provide the same number of circuit switch service lines to the CLECs for twelve months. The reason for a transition period is to allow the CLECs 12 months to provide for alternate facilities, whether that is through UNE-l, VoIP, or a commercial agreement through a third party or the ILEC itself, and also to give BellSouth time to develop the procedures and technology

to convert the CLECs' UNE-P customer base to alternative arrangements. In the TRRO, the FCC stated "The transition we adopt is based on the incumbent LECs' asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers." (§ 227, TRRO). The FCC also stated "[the FCC] also note[s] that concerns about incumbent LECs' ability to convert the embedded base of UNE-P customers in a timely manner are rendered moot by the transition period [the FCC] adopt[ed] in [the] Order." (§ 216, TRRO). BellSouth has not yet demonstrated that it has the ability to comply with the mandate. This transition period was not designed to give the ILECs a means to use a win-back campaign such as the one described above to coerce or extort customers back from CLECs like STS to BellSouth. Consumers need to know that their telecommunications provider can still provide for their needs whether it is due to growth or because they have to move (for whatever reason), and once it is known that STS can no longer provide services at parity with BellSouth (such as providing for additional circuit switching) then STS will suffer tremendous loss of business during the transition period, which would negate the whole reason of having such a transition period.

31 The commission has the authority to arbitrate any dispute regarding interpretation of interconnection terms and conditions. See Fla. Stat. § 364.162(1). Furthermore, STS is entitled to injunctive relieve against BellSouth pursuant to Fla. Stat. § 364.015. Therefore the appropriate remedy is for the commission to enter an emergency order requiring BellSouth to allow the addition of lines and change of location with UNE-P customers on STS's embedded base during the transition period.

32. In the TRRO, the FCC recognized that provisions in the Federal Act preserving state authority demonstrate that Congress did not intend to occupy the field with respect to unbundling. For example, the FCC ruled: "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would have included section 251(d)(3) in the 1996 Act." (TRO, paragraph 192, footnotes omitted.)

33 The proper way to resolve any disputes concerning the addition of lines to the embedded base is not self-help on BellSouth's part, but rather by working through the provisions in the Interconnection Agreement and following the mandate of the TRRO. Until that process has been completed, BellSouth should not be allowed to change the rates ordered by the Commission and incorporated into the Agreement.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, STS respectfully requests that the Commission:

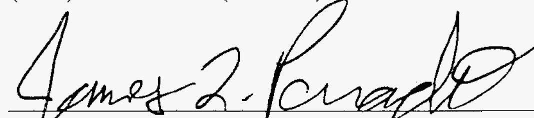
(1) Issue an Emergency Order on an expedited basis compelling BellSouth to honor STS's orders to add lines or make changes such as, change to location, for STS's UNE-P embedded customer base;

(2) Issue and Emergency Order on an expedited basis compelling BellSouth to comply with the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

Respectfully submitted,

ALAN C. GOLD, P.A.
Gables One Tower
1320 South Dixie Highway
Suite 870
Coral Gables, FL 33146
(305) 667-0475 (office)
(305) 663-0799 (telefax)

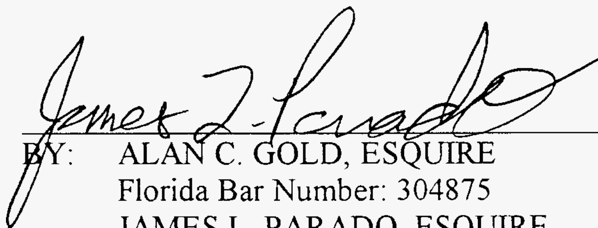


BY: ALAN C. GOLD, ESQUIRE
Florida Bar Number: 304875
JAMES L. PARADO, ESQUIRE
Florida Bar Number: 0580910

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed via Federal Express overnight on this 28th day of April 2005, to:

Meredith Mays, Esq.
Senior Regulatory Counsel
BellSouth Telecommunications, Inc
150 South Monroe Street
Room 400
Tallahassee, FL 32301-1556



BY: ALAN C. GOLD, ESQUIRE
Florida Bar Number: 304875
JAMES L. PARADO, ESQUIRE
Florida Bar Number: 0580910

BellSouth Interconnection Services
675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Vicki Wright
(404)-927-7514
Fax: (404) 529-7839

Sent Certified Mail

April 12, 2005

Keith Kramer
Saturn Telecommunication Services, Inc
d/b/a STS ("STS")
12233 SW 55th Street, Suite 811
Cooper City, Florida 33330

Re: Interconnection Agreement Negotiations Pursuant to the Federal Communications Commission's (FCC) Triennial Review Remand Order (TRRO)

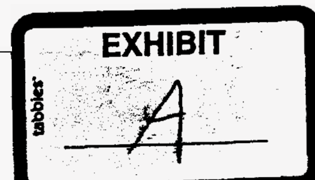
Dear Keith:

As you know, the FCC released, on February 4, 2005, its Order regarding requesting carriers' access to unbundled network elements (UNE). Since February 4, 2005, BellSouth has communicated with its wholesale customers on a number of occasions regarding the effect of the FCC's Order. On March 11, 2005, BellSouth stated that it will continue to receive and will not reject, CLEC orders for new adds as they relate to the former UNEs identified by the FCC until the earlier of (1) an order from an appropriate body, either an commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. Lastly, BellSouth has also sent to its wholesale customers proposed amendments to existing interconnection agreements so as to appropriately incorporate the FCC's ordered change of law.

Pursuant to the Modification of Agreement Section of the current Interconnection Agreement between STS and BellSouth, dated May 30, 2003, BellSouth notified you on March 18, 2005 that it wished to begin negotiations of an Amendment incorporating the FCC's TRRO that became effective on March 11, 2005. This amendment was forwarded to you via e-mail on March 18, 2005 and was to be used as the starting point for negotiations. BellSouth has not received a response to this request.

BellSouth and STS have an obligation under the Telecommunications Act to comply with the terms of the Interconnection Agreement between the Parties, which specifies the process for negotiation of amendments that are the result of any "legislative, regulatory, judicial or other legal action that materially affect the material terms" of the Interconnection Agreement. Further, paragraph 233 of the TRRO clearly states that the FCC "expect[s] that the parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." In that same paragraph, the FCC stated that a party's failure to negotiate to implement its rules "may subject that party to enforcement action." As of April 17, 2005, **thirty (30)** of the ninety (90) day negotiation period have elapsed, leaving little time for negotiations before *either party can seek dispute resolution.*

If I do not receive a response from you, or if STS continues to ignore BellSouth's efforts to negotiate an Amendment, BellSouth has the right to notify the Public Service Commission (PSC) and the FCC that STS has failed to respond to requests for negotiations of an amendment in accordance with the terms of its Interconnection Agreement and the TRRO.



Further, BellSouth reserves the right to take such other action as contemplated by the Interconnection Agreement or as permitted by law.

Please let me know if you have questions or need to discuss this Amendment.

Sincerely,

Vicki Wright
Manager - Interconnection Services

AFFIDAVIT

State of Florida }
}ss
County of Broward }

BEFORE ME the undersigned authority personally appeared, KEITH KRAMER, who, after first being duly sworn deposes and says:

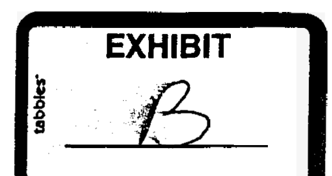
1. The following is true and correct and based upon my personal knowledge and belief.

2. I am the Executive Vice President of STS Telecom, Inc. ("STS"), and the person at STS who is primarily responsible for dealing with BellSouth regarding STS's Interconnection Agreement with Bellsouth, and negotiating the services that BellSouth provides STS.

3. Under our Interconnection Agreement, STS requested that BellSouth add lines for existing customers on our embedded base: however, despite our request, BellSouth refuses to add new lines for existing customers on our embedded base.

4. BellSouth has further advised me that it will not change or honor requests to change locations for customers on STS's embedded base.

5. It is absolutely critical to maintain STS's embedded base, that STS be able to service the embedded base. Servicing the embedded base includes the ability to add lines for existing customers, and when existing customers change locations to be able to supply them with phone service.



6. STS will loose substantial customers unless BellSouth is required to add additional lines for customers on the embedded base and change locations for the embedded base.

7. STS has already lost customers because of BellSouth's refusal to add lines to customers on STS' embedded base.

FURTHER AFFIANT SAYETH NAUGHT.

KEITH KRAMER

BEFORE ME the undersigned authority personally appeared KEITH KRAMER, who is personally known to me and has read the foregoing Affidavit and states that that facts contained herein are true and correct and based upon his personal knowledge and belief.

Andrew T. Silber
Commission # DD 061821
Expires Nov. 5, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

4/22/05,

NOTARY PUBLIC STATE OF FL
Commission No.:
Expiration:

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1550

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Complaints Against BellSouth	)	
Telecommunications, Inc. Regarding	)	ORDER CONCERNING NEW ADDS
Implementation of the Triennial Review	)	
Remand Order	)	

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, Wednesday, April 6, 2005.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding
Chair Jo Anne Sanford
Commissioner J. Richard Conder
Commissioner Lorinzo L. Joyner
Commissioner James Y. Kerr, II
Commissioner Howard N. Lee
Commissioner Robert V. Owens, Jr.

APPEARANCES:

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III
General Counsel — NC
P.O. Box 30188
Charlotte, NC 28230

R. Douglas Lackey
Senior Corporation Counsel — Regulatory
675 W. Peachtree Street, Suite 4300
Atlanta, GA 30375

For MCIMetro Access Transmission Services, LLC:

Cathleen M. Plaut
Bailey & Dixon, LLP
P.O. Box 1351
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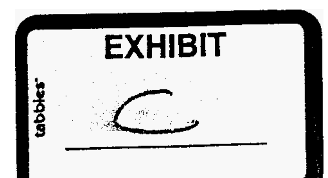

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BY THE COMMISSION: On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO), FCC Docket No. WC-04313 and CC 01-338. The *TRRO* identified a number of former Unbundled Network Elements (UNEs), such as switching, for which there is no Section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving

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[1] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.") (footnote omitted).

[2] *TRRO*, ¶ 174 (DS3 loops), 178 (DS1 loops).

[3] *TRRO*, ¶ 126 (DS1 transport), 129 (DS3 transport).

[4] *TRRO*, ¶ 137 (entrance facilities).

[5] *TRRO*, ¶ 133 (dark fiber transport), 182 (dark fiber loops).

arrangements.[6] In each instance, the FCC stated that the transition period for each of these former UNEs — loops, transport, and switching — would commence on March 11, 2005.[7]

On February 28, 2005, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a letter with the Commission that it had sent to BellSouth Telecommunications, Inc. (BellSouth) on February 21, 2005, on behalf of itself and Business Telecom, Inc. (BTI). The letter responded to a BellSouth carrier notification letter dated February 11, 2005, in which BellSouth outlined actions it planned to take in light of the FCC *TRRO*. DeltaCom argued that the *TRRO* did not allow BellSouth to refuse UNE-P orders associated with the embedded base of UNE-P customers or orders for new UNE-P customers on its effective dates.

On March 1, 2005, MCImetro Access Transmission Services LLC (MCI) filed a Motion for Expedited Relief Concerning UNE-P Orders that set forth similar arguments to those advanced by DeltaCom in its February 28, 2005, letter. MCI asked the Commission to order BellSouth to continue to accept and process MCI's UNE-P orders after March 11, 2005.

Likewise, on March 2, 2005, NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius Communications LLC (collectively, Joint Petitioners) filed a Petition for Emergency Declaratory Ruling based on similar grounds to those set forth by DeltaCom and MCI. In addition, the Joint Petitioners alleged that they had executed a separate agreement with BellSouth through which BellSouth was required to allow access to all de-listed UNEs after March 11, 2005.

On March 3, 2005, the Commission consolidated these filings in a single docket — Docket No. P-55, Sub 1550— and ordered BellSouth to respond to the MCI and Joint Petitioners' motions by March 8, 2005. The Commission also set the dispute for oral argument on March 9, 2005.

On March 4, 2005, LecStar Telecom, Inc. filed with the Commission its February 24, 2005, responsive letter to BellSouth's February 11 carrier notification letter, and CTC Exchange Services, Inc. (CTC) filed Comments in Support and Request for Expanded Relief. On March 7, 2005, Amerimex Communications Corp. filed an Emergency Petition seeking relief similar to that sought by MCI and the Joint Petitioners, and US LEC of North Carolina, Inc. (US LEC), Time Warner Telecom of North Carolina, LP and XO North Carolina, Inc. filed a Supportive Petition.

On March 8, 2005, BellSouth sought an extension of time within which to both respond in writing to the various filings described above and to appear for oral argument. Attached to BellSouth's motion was a new carrier notification letter issued by

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[6] *TRRO*, ¶ 142 (transport), 195 (loops), 226 (switching).

[7] *TRRO*, ¶ 143 (transport), 196 (loops) 227 (switching).

BellSouth on March 7, 2005, in which BellSouth extended the deadline for accepting "'new adds' as they relate to the delisted UNEs until the earlier of 1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders, or 2) April 17, 2005."

On March 8, 2005, the Commission issued an order rescheduling the oral argument for April 6, 2005, and granting BellSouth an extension until March 15, 2005, to respond to the various motions, complaints and letters that had been received in this docket.

On March 9, 2005, the Commission received a letter from CTC in which it advised the Commission that it would rely on its written comments and the arguments of other CLPs and accordingly would not participate in the oral argument. On the same date, the Commission received a copy of a letter from Navigator Telecommunications, LLC to BellSouth dated February 28, 2005, in which Navigator objected to BellSouth's proposed implementation of the *TRRO*.

On March 14, 2005, BellSouth moved to strike the filing by Amerimex on the grounds that the filing had not been signed by an attorney licensed to practice in North Carolina. The Commission subsequently concluded that good cause existed to grant the motion unless Amerimex cured the deficiency noted by BellSouth by March 31, 2005. Amerimex withdrew its Emergency Petition on March 22, 2005, stating that it had entered into a commercial agreement with BellSouth that mooted its Petition.

On March 15, 2005, BellSouth filed its responses to the relief sought by MCI, Joint Petitioners and the other parties listed above. On March 16, 2005, AT&T of the Southern States, LLC (AT&T) asked the Commission, to the extent it awarded any relief to the various petitioners, to award the same relief to AT&T. Prior to the oral argument, the Commission received several submissions from the parties conveying "supplemental authority" supporting their various positions.

Oral argument took place as scheduled on April 6, 2005. Counsel for various parties appeared at that time and argued their respective positions before the full Commission. At the conclusion of the argument, the Presiding Commissioner asked the parties to submit post-argument briefs and/or proposed orders. MCI, US LEC, BellSouth, Joint Petitioners, Public Staff, and CTC made post-hearing filings.

On April 15, 2005, the Commission issued a Notice of Decision and Order containing the conclusions set out below.

1. With respect to the provision of UNE-P, DS1, and DS3, the Commission declines to declare that BellSouth must provide "new adds" of these UNEs outside of the embedded customer base. Nevertheless, BellSouth must continue to process orders for the existing base of CLP customers pending completion of the transition process.

2. With respect to the issue of the provision of loop and transport, the Commission finds that the representation of BellSouth at the oral argument that it will follow the procedures outlined therefor in the TRRO renders this issue moot.

POSITIONS OF PARTIES

BellSouth argued that the FCC's ban on "new adds" of former UNEs –i.e., the addition of new customers using unbundled access to local circuit switching—was "self-effectuating" and relieved BellSouth of any obligation under its interconnection agreements to provide such "new adds" to CLPs. *See, e.g.,* TRRO, para. 3. BellSouth relied on what it believed to be the plain language of the TRRO. It argued that the FCC's new rules unequivocally state that carriers may not obtain new UNEs, and noted that the FCC had stated that there would be a transition period for *embedded UNEs* to begin on March 11, 2005, which would last for 12 months. *See,* TRRO, para. 199. The FCC made almost identical findings with respect to high-capacity loops and transport. *See, TRRO,* para. 142, 195, also 47 C.F.R. 51.319(e)(2)(i), (ii),(iii), and (iv) and 51.319(a)(4)(iii), (a)(5)(iii), and (a)(6). The FCC also said that the transition period was to apply only to the embedded customer base and does not permit CLPs to add new customers using unbundled access to local circuit switching. *Id.* There are at least a dozen instances in the TRRO where it is made clear that there are to be no new adds for these UNEs. *See*, paras. 3, 4, 142, 145, 195, 198, 227; Rules at p. 147, 148, and pp. 150-152.

BellSouth also argued that the FCC has the legal authority to implement self-effectuating changes to existing interconnection agreements. This is implied by the FCC's decision in the TRO *not* to make its decisions in that order self-executing and is recognized by case law, notably *Cable & Wireless, PLC v. FCC,* 166 F.3d 1224, 1231-32 (D.C. Cir. 1999)(*Cable and Wireless)* (*quoting Western Union Tel. Co. v. FCC,* 815 F.2d 1495, 1501 (D.C. Cir. 1987). *See, also, United Gas Improvement Co. v. Callery Properties, Inc.* 382 U.S. 223, 229 (1965)(*Callery Properties*)(agencies can undo what is wrongfully done by virtue of their orders). The FCC had also made the requisite public interest findings under the *Mobile-Sierra* doctrine[8] inasmuch as the FCC in various places noted that certain unbundling proposals constituted a disincentive to CLP infrastructure investment. Even apart from the *Mobile-Sierra* doctrine, the FCC has the authority to create a self-effectuating change because interconnection agreements are not truly "private contracts," but rather arise within the context of ongoing federal and state regulation. Numerous state commissions have rejected the relief sought by the CLPs (Ohio, Indiana, New York, California, Texas, Kansas, New Jersey, Rhode Island, Maine, Massachusetts, Delaware, Michigan, Maryland, Florida, Virginia and Pennsylvania). On April 5, 2005, the United States District Court for the North District of Georgia entered a preliminary injunction against enforcement of the Georgia Public Service Commission's order favorable to the CLPs on the same subject matter, finding a significant likelihood that BellSouth would prevail on the merits. The Court found that reliance on the *Mobile-Sierra* doctrine was unnecessary because, among other things,

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[8] Under the *Mobile-Sierra*, doctrine the FCC may modify the terms of a private contract if the modification will serve the public interest.

the FCC "was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs." Order, *BellSouth Telecommunications, Inc. v. MCIMetro Transmission Services, Inc.* No. 1:05-CV-0674-CC (April 5, 2005) (Georgia District Court Order).

BellSouth further maintained that CLPs are not entitled to UNE-P under state law because, even if North Carolina were not preempted by federal law, the Commission has not conducted the required impairment analysis. In any event, CLPs are not entitled to UNE-P under Section 271 of the Telecommunications Act because, among other things, there is no obligation for BellSouth to combine Section 251 and Section 271 elements, much less at TELRIC rates. Section 271 elements fall within the exclusive jurisdiction of the FCC.

As for the Abeyance Agreement between BellSouth and the Joint Petitioners (Nuvox, KMC, and Xspedius), this was a procedural agreement between BellSouth and those parties entered into in July, 2004. It provided that, during their arbitration proceeding, BellSouth would afford the Joint Petitioners "full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such...agreements are replaced by new interconnection agreements...." This Agreement does not restrict BellSouth's rights under the TRRO. The Abeyance Agreement is limited in application to "changes of law," and the FCC's bar on new adds beginning on March 11, 2005, does not trigger the parties' "change of law" obligations under current interconnection agreements because it is self-effectuating. Moreover, the implementation of the TRRO is not covered by the Abeyance Agreement. The language of the Abeyance Agreement and the timing of the parties' agreement to hold the change of law process in abeyance both demonstrate that the scope of the agreement was limited only to changes resulting from *USTA II*. It is not reasonable to believe that eight months before the release of the TRRO, BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the TRRO or any other FCC Order that could be tangentially related to *USTA II*. BellSouth also noted that the deadline to add new issues under the Abeyance Agreement expired on October 2004. This means that, while parties could add issues arising out of *USTA II*, they could not add issues arising out of the TRRO because it had not been issued. As for the phrase in the Abeyance Agreement, "*USTA II* and its progeny," the term "progeny" cannot refer to the TRRO because "progeny" means a line of opinions that succeed a leading case and could therefore only refer to opinions of a court or a state commission reaffirming or restating the D.C. Circuit's decision in *USTA II*.

Public Staff identified the major issue as being whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P adds as of March 11, 2005, or whether it intended for such provision to cease after the ILEC and the interconnecting CLP had arrived at a new agreement through the change of law provisions of their existing interconnection agreement. The Public Staff believes that the FCC did intend that ILECs no longer be compelled to provide new adds after March 11, 2005. This is based upon a reading of the TRRO as a whole. The TRRO states some fifteen times that

there will be no new adds. While the TRRO does refer to the change of law process in Paragraph 227, the reference comes immediately after discussion of the transition process for the embedded base of UNE-P customers. At the oral argument, the CLPs placed much reliance on their reading of the *Mobile-Sierra* doctrine, specifically that the FCC may modify a contract only if it has made particularized findings that the public interest demands such modification. The CLPs appear to make two alternative arguments: either the failure to meet the standards for application of the doctrine shows that the FCC did not intend to modify interconnection agreements to disallow new adds until the conclusion of any change of law negotiation or, if the FCC did intend to modify the contracts, it did so improperly by failing to make particularized findings that the public interest demanded the abrogation of interconnection agreements. While it is not clear why the FCC did not address the application of the *Mobile-Sierra* doctrine, this omission is not persuasive evidence that the FCC intended anything other than to eliminate the requirement to provide new UNE-P adds. The proposition that the Commission should reject the FCC's attempt to abrogate private interconnection agreements because it failed to comply with the *Mobile-Sierra* doctrine should also be rejected. The role of the Commission is generally not to determine whether an FCC Order complies with the law but rather to interpret and apply FCC Orders as best it can. Federal courts are in a much better position to determine if the FCC exceeded its authority or complied with all applicable law than the Commission. Finally, the Public Staff argued that it would be illogical for the FCC to prescribe a 12 month period to perform tasks for an orderly transition and at the same time require BellSouth to provide new UNE-P arrangements until the end of the 12 months or the conclusion of the change of law process, whichever comes sooner. This would undermine the orderly transition process prescribed by the FCC. Also, CLPs are not left without alternatives to new UNE-P adds, since they can negotiate commercial agreements or serve the customer through resale or UNE-L.

US LEC argued that the interconnection agreements between BellSouth and the CLPs are valid and enforceable and have not been changed in a self-effectuating manner by the TRRO. Rather, it is contemplated both in the interconnection agreements and in the TRRO that the change-of-law process will be observed, including in the matter of new adds.

US LEC maintained that the Commission has the authority to rule on matters pertaining to the enforcement of interconnection agreements. It observed that the FCC does not set the terms of interconnection agreements, but rather such agreements are the product of negotiations between the parties and, in some cases, arbitration by state commissions. These agreements are neither filed nor approved by the FCC and the FCC plays no role in their enforcement. The principal connection of the agreements with the FCC is that the FCC's rules provide the back-drop for the parties' negotiations and the decisions of state commissions. Parties can negotiate and agree to terms that deviate from the rules established by the FCC. Thus, it does not follow that any changes to the FCC's rules of interconnection automatically and by operation of law override contrary provisions of negotiated and approved interconnection agreements. Specifically, the change-of-law provisions in BellSouth's interconnection agreements

have not been abrogated by the TRRO. The FCC has stated plainly that the *Mobile-Sierra* doctrine does not apply to interconnection agreements. *See In the Matter of IDB Mobile Communications, Inc. v. Comsat Corp.*, FCC 01-173 (released May 24, 2001) (*IDB Mobile).* US LEC also noted that the FCC had specifically refused to overrule provisions of interconnection agreements in the TRO. The *Mobile-Sierra* doctrine is not mentioned anywhere in the TRRO, nor are there any words in the TRRO definitively stating as such an intent to override change-of-law provisions. BellSouth's various citations to that effect in the TRRO are inapposite and fall far short of a clear statement. In any event, the *Sierra-Mobile* doctrine is not applicable to state-approved agreements. Even if it were, it would require factual findings not present in the TRRO to support explicit findings of the public interest determination.

US LEC further maintained that BellSouth's position as to loop and transport provisioning is inconsistent with the express provisions of the TRRO. This, too, BellSouth wishes to deny as to new adds. The TRRO sets up a self-certification procedure by CLPs, which the ILECs must accept but could challenge through dispute resolution procedures. US LEC did note that BellSouth had backed off this position at the oral argument, where it stated that it would follow the procedures set forth by the TRRO with respect to high capacity loops and dedicated transport.

US LEC pointed out that, if BellSouth's views are countenanced, there would be controversy over the meaning of "embedded customer." The TRRO text speaks repeatedly of the "embedded customer," while the new rule adopted in the TRRO speaks in terms of embedded lines and loops. It is unknown at this point what interpretation BellSouth will take with respect to this question. Perhaps BellSouth will tell CLPs that they can no longer serve an "embedded customer" because they seek a change to an embedded line or because they seek a new line. These are the types of disruptions that the change-in-law negotiations are intended to prevent.

Joint Petitioners rejected BellSouth view that aspects of the TRRO are self-effectuating. To the contrary, any change in law must be incorporated into interconnection agreements before becoming effective. The TRRO has expressed no clear intent that existing interconnection agreements should be abrogated, and the legal doctrine on which BellSouth relies does not apply to interconnection agreements. Even if it did, the TRRO does not contain the analysis required to invoke the doctrine.

With respect to the "self-effectuating language" in Para. 3, Joint Petitioners noted that this was the single use of this term in the TRRO. It means nothing more than that the FCC adopted an impairment test that did not require delegation to the states for specific impairment findings. The test itself is self-effectuating. The importance attached by BellSouth to the March 11, 2005, "effective date" is also misplaced. All FCC rules have an effective date, but this does not mean that they are automatically incorporated into interconnection agreements as of this date.

Joint Petitioners maintained that the *Mobile-Sierra* doctrine does not apply to interconnection agreements under Section 252. *See, IDB Mobile.* The doctrine only

applies to contracts *filed* with the FCC and does not extend to contracts that are construed to be subject to the FCC's jurisdiction. *See, Cable and Wireless.* In any event, the TRRO contains none of the analysis required under *Mobile-Sierra.*

Joint Petitioners also responded to the rhetorical question at oral argument as to what public interest would be served by permitting new adds by pointing to the sanctity of contracts. The question is not whether the Commission has authority under North Carolina law to invalidate certain anticompetitive contracts but whether the integrity of contracts can be violated by the FCC absent proper application of the *Mobile-Sierra* doctrine. The *Callery Properties* case, which BellSouth cited for the proposition that an agency "can undo what is wrongfully done by virtue of its order," is not apposite. It pertained to the Federal Power Commission and concerned the making of refunds. It does not suggest that the FCC may abrogate privately negotiated contractual provisions with no reflection in the record of its intent to do so or that such action is in the public interest.

Significantly, the FCC refused to override the negotiation process in the TRO, and indeed the language of the TRRO obligates BellSouth to negotiate (Para. 233). The language relied upon by BellSouth simply says that the transition period does not allow new adds, but the FCC did not prohibit new adds under existing interconnection agreements. The TRRO does not preclude new adds before a transition plan is adopted, but it clearly contemplates that a transition plan will be incorporated into existing interconnection agreements for delisted UNEs. The TRRO does expressly state that the parties are free to negotiate alternatives to the transition plan included in the Order. *See,* Para. 145. Fundamental fairness requires BellSouth to follow the Section 252 process.

Finally, the Joint Petitioners argued that BellSouth's refusal to process new adds is contrary to the Abeyance Agreement. The Joint Petitioners, among other arguments, placed particular stress on the provision that the parties "have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA and it progeny.* (Abeyance Agreement at 2, emphasis added). BellSouth's reading of the term "progeny" is too narrow. It is not limited to court or state commission decisions but has the wider meaning of "offspring." Surely, the TRRO is the "offspring" of *USTA II.* Moreover, the parties had anticipated this contingency because of the reference in the Joint Issues Matrix submitted in October 2004 concerning "Final Rules," defined as "an effective order of the FCC adopted pursuant to the Notice of Proposed rulemaking [NPRM], WC Docket No. 04-313, released August 20, 2004, and effective September 13, 2004." The NPRM referenced in this definition is the *Interim Rules Order.* The "Final Rules" referenced in the revised matrix cannot refer to anything other than the TRRO, which is the order promulgating "Final Rules."

Lastly, the Joint Petitioners argued that the weight of authority from other jurisdictions favors Joint Petitioners' position. This is especially so in the BellSouth region.

MCI echoed many of the arguments made by the other CLPs. MCI particularly stressed that the FCC had nowhere expressed an intent to abrogate existing contracts and, even if it had, it had nowhere discussed or met the high standards for abrogation under the *Sierra-Mobile* doctrine. BellSouth appears to argue that the FCC's intent to abrogate was implied, but this runs afoul of the relevant standards that must be met. Notably, the Georgia District Court Order did not discuss the *Mobile-Sierra* doctrine. BellSouth's citation to the public interest involved in the demise of UNE-P—that it does not promote investment—is insufficient to justify sidelining the interconnection agreement change-of-law process. There are serious questions as to whether the FCC has the authority to abrogate interconnection agreements (*IDB Mobile)*, or whether it can abrogate contracts over which it lacks exclusive authority (*Cable & Wireless). Callery Properties* is inapposite because it was not the unbundling conclusions *per se* that were found to be wrongful, but rather there was no longer impairment because of changed circumstances. Indeed, the principal "wrong" found by the court in *USTA II* was the FCC's sub-delegation scheme. Thus, the TRRO cannot be said to be "undoing" anything "wrongfully done." MCI also stated that there had been numerous decisions, especially in the BellSouth region, that have favored the CLPs. MCI also argued in its Motion that it should be entitled to UNE-P under Section 271.

CTC made a supplemental filing setting out various issues that there were to negotiate when the TRRO clearly eliminated certain UNEs. Such issues include combining multiple DS1 circuits to DS3 circuits, revising EEL conversion language, combining resale and UNE service on the same account, developing shared collocation arrangements, combining special access and UNE services, implementing a methodology for resolving disputes regarding UNE obligations, and working out connections to shared transport.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

1 New Adds

After careful consideration of the arguments and filings of all parties, the language of the TRRO, the decisions of other state commissions, and the practical implications of this decision, the Commission concludes that good cause exists to decline to declare that BellSouth must provide "new adds" of UNE-P, DS1, and DS3 UNEs outside of the embedded customer base after March 11, 2005, but that BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process.

The principal question before the Commission is whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P, DS1, and DS3 adds as of March 11, 2005, or whether it intended such provision to cease only after the ILEC and

the interconnecting CLP had arrived at new contractual language through the change of law provisions of the interconnection agreement.

As has been remarked by others, the TRRO is not in all respect a model of clarity. That is why there is a disagreement on the question of "new adds." However, one thing is clear about the TRRO. It is the culmination of a long and tortuous process in which the FCC has examined unbundling and has frequently made decisions concerning this subject that have repeatedly been found wanting by the federal courts, most recently by the D.C. Circuit in *USTA II*. The TRRO was the FCC's attempt to conform itself to the demands of that decision. In doing so, it de-listed certain UNEs and crafted a transition period for the embedded customer base for the purpose of providing an orderly transition to other arrangements.

The Commission is persuaded that the sounder reading of the TRRO is that the FCC intended that "new adds" outside the embedded customer base should go away immediately—i.e., as of March 11, 2005—for the reasons as generally set forth by BellSouth and the Public Staff. The alternative reading is too strained and involves the creation of various anomalies and even absurdities. For example, if "new adds" outside of the embedded customer base were allowed, how does this assist in an orderly transition *away* from such arrangements, which, however obscure the FCC may have been in other matters, was its plain intent here? How sensible is it to have the question of "new adds" outside the embedded customer base to be the subject of negotiations in the transition period when that question has already been decided in the TRRO?

At the oral argument and in their filings, the CLPs argued that the FCC did not meet the requirements of the *Mobile-Sierra* doctrine said to be necessary for the FCC to abrogate contract provisions. Broadly speaking, this doctrine states that the FCC may modify the terms of private contracts if the modification serves the public interest. Essentially, the CLPs maintained that the FCC's intent to abrogate was less than plain and its public interest finding was not expressed with sufficient particularity.

The Commission is not convinced that the *Mobile-Sierra* doctrine is the only avenue by which the FCC can abrogate contract provisions. For example, an agency may abrogate a contract provision when it is undoing "what is wrongfully done by virtue of a previous order." *Callery Properties*, cited with approval in the *Georgia District Court Order*. The context here is important, since in *USTA II*, the D.C. Circuit made harsh observations about the FCC's "failure, after eight years, to develop lawful unbundling rules."

But even if *Mobile-Sierra* is the appropriate approach to contract modification, the Commission believes that the FCC has expressed its belief as to the overriding public interest with sufficient particularity given the general nature of the subject-matter, which is the broader subject of the availability of certain classes of UNEs. The public interest the FCC expressed is related to the investment in infrastructure and the efficient allocation of resources in the economy.

In any event, the contracts that are being modified are not strictly private in nature but are rather contracts which, if negotiated, are approved by government, and, if not negotiated, are arbitrated by government. The entire process, from start to finish, is implicated in a regulatory process which, while formally conducted by state commissions (or by the FCC in default of state action), must examine in the first instance FCC orders and rules. *Accord., E.spire Communications, Inc. v. N.M. Pub. Regulation Comn.,* 392 F.3d. 1204 (10th Cir., 2004); *Verizon Md., Inc. v. Global Naps, Inc.,* 377 F.3d. 356 (4th Cir., 2004) (interconnection agreements are a "creation of federal law" and are the "vehicles chosen by Congress to implement the duties imposed by Sec. 251"). It is therefore entirely reasonable that the FCC can abrogate contract provisions found not to be in the public interest given the underlying legal structure.

Finally, there is the question of how far the ban on "new adds" should extend as applied to the embedded customer base. The Commission believes the better view is that ILECs like BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process. Although this decision, like many others, is likely to be controverted, and colorable arguments can be adduced on either side, the Commission believes that the bright line that the FCC was drawing was between those *inside* the embedded customer base and those *outside* of it. After all, the TRRO focuses on the "embedded customer base," not on existing access lines. The Commission does not believe that it was the FCC's intent to impede or otherwise disrupt the ability of CLPs to adequately serve their existing base of customers in the near term. The Commission notes that the CLPs now serve thousands of customers, many of them business customers, with these de-listed UNE arrangements. Given the vital importance of fast telecommunications access in a highly dynamic economy, these customers would be baffled and impatient if they were to discover that adding a new line or even simply a new feature in the near term was impossible with their current provider. They may very well lose confidence in that provider. This is not good for competition, which is the overarching purpose of the Telecommunications Act.

Thus, we believe that, through a planned, orderly, and nondisruptive transition process under state commission supervision, the FCC intended that the CLPs should retain the ability to adequately serve their customers during the transition period. The Commission has already established a docket with respect to BellSouth in Docket No. P-55, Sub 1549 to deal with the transition.

2. Abeyance Agreement

The same analysis applicable to "new adds" also applies to the Abeyance Agreement between BellSouth and the Joint Petitioners. Under the Agreement's terms, the existing, underlying interconnection agreement is to be carried forward until the new interconnection agreement is reached. Although the Joint Petitioners have the better of the argument that the phrase "*USTA II* and its progeny" includes the TRRO, this is not determinative. What is determinative is that the FCC reached out and negated certain existing provisions of all interconnection agreements to the extent that they allow "new

adds" outside of the embedded customer base. This applies *pari passu* to the existing agreement between BellSouth and the Joint Petitioners.

3 Loop and Transport

BellSouth indicated at oral argument that it would continue to provision loop and transport in accordance with the self-certification/protest process outlined in the TRRO. BellSouth's announcement renders this issue moot.

4. State Law UNEs

In this docket there has been some discussion as to whether or not delisted UNEs could nevertheless be revived under state law. This is an interesting discussion, but this discussion is ultimately irrelevant to the issue before the Commission in this docket. Although G.S. 62-110(f1) allows the Commission to order the "reasonable unbundling of essential facilities, where technically and economically feasible," the Commission has not made the findings necessary to require the provision of delisted UNEs under state law.

5. Section 271 UNE-P

MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION

This the 25th day of April, 2005.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

dl041805.01

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DOCKET # 19341
DOCUMENT # 80721

Docket No. 19341-U

In Re: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**

ORDER ON MCI'S MOTION FOR EMERGENCY RELIEF CONCERNING UNE-P ORDERS

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

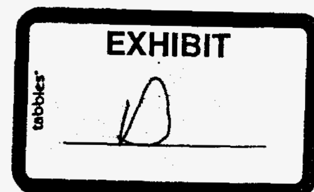
(1) Order BellSouth Telecommunications, Inc. ("BellSouth") to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the parties' interconnection agreement ("Agreement");

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *Triennial Review Remand Order* ("TRRO");

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth. The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*



The FCC also made non-impairment findings with regard to dedicated loop and transport. For DS3-capacity loops, requesting carriers were found not to be impaired at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. (TRRO ¶146). The FCC found that "requesting carriers are not impaired without access to DS-1 capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators." *Id.* The FCC's non-impairment finding with respect to dark fiber loops applied to any instance. *Id.*

For DS1 transport, the FCC concluded that competing carriers were not impaired "on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines." (TRRO ¶ 66) (emphasis in original). Competing carriers were also found to be not impaired without access to DS3transport "on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). For dark fiber transport, competing carriers were found not to be impaired "without access on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). The FCC made an across the board non-impairment finding for entrance facilities. *Id.*

I. MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the TRRO it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . [MCI] or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

II. BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

III. Conclusions of Law

A. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission ("FERC"), the D.C. Circuit Court of Appeals held that it

is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching." (BellSouth Response, p. 4, *quoting* TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth does not cite to any language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to

monitor this area closely to ensure that parties do not engage in unnecessary delay.

(TRRO § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge, at minimum, that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Commission's decision is consistent with the conclusion it reached in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise*." (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection

agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket, and concludes that such reasoning applies in this instance as well.

While MCI's Motion was entitled "Motion for Emergency Relief Concerning UNE-P Orders," the relief sought included could apply to both mass market local switching and dedicated loop and transport. MCI asked that BellSouth be ordered to implement the TRRO using the change of law provisions in the Agreement. In addition, MCI asked that the Commission order the relief it deemed just and reasonable. The Commission finds it just and reasonable to order parties to abide by the change of law provisions in their interconnection agreements for all changes, regardless of whether the change is on UNE-P or loops and transport. The analysis illustrating that the FCC did not intend to abrogate the parties' rights under their contracts applies as well to dedicated loop and transport.

In addition, the Commission concludes that it is just and reasonable to impose the requirement that parties abide by the terms of their interconnection agreements to implement the TRRO on all parties and the modification of all interconnection agreements. The question of whether the TRRO must be implemented pursuant to the parties' interconnection agreements must be resolved on an expedited basis. This same threshold question applies equally to all carriers. There is no reason why the TRRO would be deemed to abrogate some parties' contractual rights and not others. In light of the preceding, the most just and administratively efficient manner to resolve MCI's Motion is to apply the conclusions to the implementation of the TRRO in all interconnection agreements.

B. Issues related to a possible true-up mechanism should be decided at a later time.

The Commission finds that it is prudent to defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter was brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. The Commission determines that it may be of assistance for the Commission to confirm, prior to voting on this issue, that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved.

C. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of

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the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Commission will decide those issues in the regular course of this docket.

IV. Ordering Paragraphs

WHEREFORE IT IS ORDERED, parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order and this condition applies to all carriers, not just MCI and BellSouth, and to all changes, regardless of whether the change is on UNE-P or loops and transport.

ORDERED FURTHER, that issues related to a possible true-up mechanism should be decided at a later time.

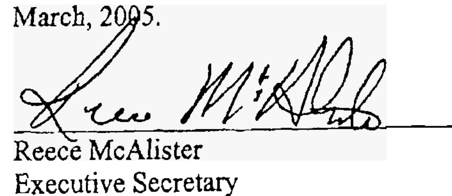
ORDERED FURTHER, that issues related to BellSouth's obligations to continue to provide mass market unbundled local switching or dedicated loop and transport under either Georgia law or Section 271 should be resolved by the Commission in the regular course of this docket.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

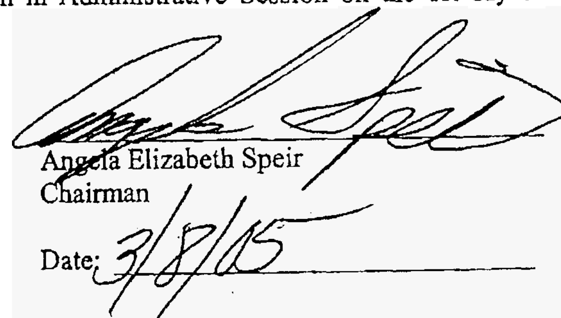
ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of March, 2005.



Reece McAlister
Executive Secretary

Date: 2-8-05



Angela Elizabeth Speir
Chairman

Date: 3/8/05